No. 1171.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

E. J. COTTON, J. B. AGASSIZ, and C. E. COTTON, Copartners Doing Business Under the Firm Name and Style of COTTON BROTHERS AND COMPANY,

Appellants,

vs.

MARY K. ALMY,

Appellee.

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BRIEF FOR APPELLEE.

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FOREWORD.

The court will recollect that on this appeal, appellants' brief was not served and filed until the day preceding the time set for the hearing, and, of course, a copy thereof could not be received at Honolulu until at least a week later. As the appeal came up from Hawaii the court denied our motion to dismiss it for failure to serve

and file the brief within the time required by the Rules and the cause was continued for hearing until the last day of the term, to permit of our communication with appellee's counsel in Honolulu. Thereupon we cabled such counsel; but it was not until within the last few days that the mail from Hawaii brought word from him together with the following brief, which was, in the main, prepared as a trial brief, upon submission of the cause for decision after the trial thereof. In the very brief time intervening since the receipt of this brief from our associate other engagements of a most pressing character have prevented us from changing its form so as to make it the reply brief of the appellee. We have no apology to offer for the substance of the brief—we submit that it will be found to be a masterly analysis of the evidence adduced at the trial, coupled with the citation of authorities amply supporting the decision which the trial court—it seems to us—unavoidably reached. As appellants' only hope of inducing this court to reach a different result lies in the reviewing of conflicting testimony, the ample references in this brief to the record do not appear to be out of place, and, while we meet our adversary on this ground, we are not unmindful of the principle that this court will not disturb any finding of the trial court based upon conflicting testimony taken in open court, unless such finding is clearly against the weight of evidence.

Perriam v. Pac. Coast Co., 133 F. 140;
Alaska Packers' Assn. v. Domenico, 117 F. 99;
Paauhau Sugar Co. v. Palapala, 127 F. 920;
Baton Rouge etc. Co. v. George, 128 F. 914.

STATEMENT OF THE CASE.

This is an action for damages claimed to arise from a maritime tort. The libel is founded upon the alleged negligence of the libellee; and, of course, the libellee disclaims any negligence in the premises. The libellant was the owner of a certain house-boat. The house-boat consisted of a scow and superstructure, and was used by the libellee as a sort of headquarters for the men in its employ while carrying out a certain contract to deepen the entrance to Pearl Harbor in this Island. The contract being completed, the libellee undertook to tow the house-boat back to Honolulu; but by reason of want of judgment, mismanagement and gross carelessness, the boat became a total wreck. It is of this that the libellant complained, and it is because of this that the libellant asks damages. The house-boat had been leased to the libellee under a lease which required the libellee to return it in good order, and which liquidated the damages, in the event of failure to return in good order, at $2,500.00.

THE PLEADINGS.

The story of the transaction is told at length in the libel, and the lease under which the libellee had possession of the house-boat is made an exhibit attached to the libel. The answer of the libellee contains very many admissions useful to the libellant. It admits the whole of the first article of the libel. It admits the libellant's ownership of the house-boat, and the execution of the lease in question. It admits the attempted towage from Pearl Harbor to Honolulu, and that the tow-boat, the

Kaena, was operated and controlled by the libellee. It admits that the tow included two laden scows, in addition to the house-boat (Record, p. 21). It admits that one-half mile west of Kalihi entrance, the house-boat "suddenly went over on one side". It admits that the house-boat was then anchored. It admits that the tow-boat then went to Honolulu with the house-boat people, "and with the said laden scows". It admits that later on the tug returned for the house-boat and brought it to Honolulu. In its attempt to describe the accident, this answer tells us that the house-boat "turned over", and that the turning over was due to the fact that the superstructure was so slightly tacked to the scow that it became gradually loosened from the *rocking* of the scow.

This answer contains sundry affirmative allegations. Thus it alleges and sets up the agency of H. N. Almy for Mary K. Almy, and the delivery of the boat to the libellees through H. N. Almy at Pearl Harbor; and it asserts that it was the libellees' duty to redeliver the boat at Pearl Harbor. It is next asserted that the lease by its terms terminated on July 29th, 1903, and that Mary K. Almy was notified thereof; but it should be noted that the claim here is that the lease terminated *by its terms;* and that no claim is made that the lease terminated because of this notice. In article four of the libel it is alleged that at the time of the occurrence of the loss and damage complained of, the house-boat was entirely in the possession and under the control of the libellees under and pursuant to the lease, that neither the libellant nor any agent or representative of hers was, at that time, either in charge or aboard of said house-boat,

and that neither the libellant nor any agent or representative of hers participated directly or indirectly in the facts and circumstances constituting the marine tort complained of, and that the libellant was wholly ignorant of the loss and damage until after the same had occurred and accrued. But when we turn to the answer, we find the libellee asserting "that at no time subsequent to " said 29th day of July, A. D. 1903, was said house-boat " in the possession of the said libellees under or by vir- " tue of said lease, and at no time after said 29th day of " July, A. D. 1903, were the said libellees, or either of " them, in the sole possession or control of said house- " boat under or pursuant to the terms of said lease"; and there the answer stops. No attempt is made to deny the allegation of the libel that neither the libellant nor any agent or representative of hers was at the time of the loss and damage either in charge or aboard of the house-boat; no attempt is made to deny that neither the libellant nor any agent or representative of hers participated directly or indirectly in the facts and circumstances constituting the marine tort complained of; and no attempt is made to deny that the libellant was wholly ignorant of the loss and damage until after the same had occurred and accrued. And as part of its affirmative allegations, the answer sets up "that at the termination " of the lease aforesaid, as hereinbefore set forth, the " said libellant requested the said libellees to remove " said house-boat from Pearl Harbor to the Port of " Honolulu, for the convenience of said libellant; that " thereupon, and solely as a favor to and for the con- " venience of said libellant, said libellees agreed to so

" remove said boat, under the express stipulation and " agreement, however, that the said libellees would in " no manner be responsible for any loss or damage to " said house-boat which might occur while said boat was " being moved to said Port of Honolulu; that under and " pursuant to said request of said libellant and under " said stipulation and agreement so entered into, said " libellees did, on the 4th day of August, A. D. 1903, " proceed to remove said house-boat from said Pearl " Harbor to the Harbor of Honolulu in said Island of " Oahu". It may be observed in passing that these allegations are direct and allege no delivery through an agent. And before leaving this description of the pleadings it may not be amiss to point out that the libel, in describing the character of the tow, and the mode in which that tow was made up, describes it as a "tandem tow"; in the answer, no attempt whatever is made to deny the allegation of the libel that the tow was a tandem tow, in which the tow-boat came first, then followed the house-boat, and then astern of the house-boat came the two laden scows; and the answer in more than one place distinctly admits that these scows, which brought up the rear of this tandem tow, were laden scows.

STORY OF THE WRECK.

It is thus plain from the pleadings that no controversy exists as to many of the facts:

(a) That Mrs. Almy owned the boat.

(b) That she leased it to libellees.

(c) That libellees attempted to tow it from Pearl Harbor to Honolulu.

(d) That the motive power was a tug operated and controlled by libellees.

(e) That those in charge of the operation of towing the house boat as aforesaid, were exclusively the employees of the libellees.

(f) That the tow was made up in tandem, the house-boat being between the tug and the two "laden scows".

(g) That on the way, the house-boat was "turned over", and its superstructure destroyed, only the dismantled scow remaining.

(h) And that as alleged in the libel, and not denied in the answer, neither the libellant nor any agent or representative of hers, was either in charge or aboard of said house-boat during said tow, or participated either directly or indirectly in the facts and circumstances constituting the maritime tort complained of, the libellant acquiring her first knowledge of her loss after the disaster had occurred.

Upon these facts, gleaned from the pleadings alone, it would seem that some explanation of the disaster should be forthcoming from the libellees; they were in charge, control and government of the operation; it was their appliance, handled by their employees, that was doing the towage; it was they who made up the tow; it was they who managed the entire business; and it was while they and their appliances were doing this that the wreck occurred.

But the presumptions arising from the pleadings are enforced by the direct testimony of Allan Dunn, a gentleman of good standing, intelligent, without any motive to falsify, and who relates what he actually saw. He had been yachting with Mr. Hobron, and thus came to be a witness to the wreck. He describes fully the kind of tow, the condition of the wind, the weather and the sea, the periodical tautening of the tow line, the dripping of water from it when it stretched out, the wreck proper, the condition of the light, the condition of the scow next morning, and the best time to tow; and at pages 40 and 41 of the Record, he also describes the air courses which were in the scow.

This story is not contradicted as to its main facts by either Scott, Wheeler or Strem. There are some minor points of difference among the witnesses which will be discussed hereafter, but as to the main facts of the casualty, resulting in the destruction of the house-boat, there is no substantial conflict. Scott emphasizes the necessity for favorable weather in making the tow, at page 57 of the Record; at page 59 he describes the tandem tow; on page 61 he tells us that he saw that the house-boat "got capsized"; on page 62 he explains that the more he towed the more he pulled the house off the scow; on page 62 he explains that he anchored the remains of the house-boat, and took the scows to Honolulu; on page 63 he tells us that when he returned from Honolulu he found that "the house was gone"; and then on page 64 he says that he towed what was left to Honolulu, "and "it took nearly three hours to go to Honolulu from "there. I was not more than two miles from the mouth

" of Honolulu Harbor, so you can imagine the condition " it was in". Captain Scott never examined the hull very thoroughly, and was not aware of any air courses, saying, "I never saw any" (page 65); purely negative testimony which in no way meets the affirmative testimony of Allan Dunn.

Stitt v. Huidekopers, 84 U. S. (17 Wall.) 384;
Paauhau Sugar Plantation Co. v. Palapala, 127 Fed. Rep. 925.

There may have been innumerable air courses that Captain Scott "never saw"; and he nowhere pretends that he ever looked for any of them; he admits that " there are little ports inside around the deck, out tow- " ards the sides of her" (65). Both on direct and on cross examination, Captain Scott admitted that the libellees' contract at Pearl Harbor was finished and that everything was to be towed up at once to clear up the whole job (Record, pp. 56-7, 66-7); and from this testimony, it would seem as if "the safety of the tow was " subordinated to the purpose of saving an extra trip " by the tug".

The Temple Emery, 122 Fed. Rep., 180, 183-4.

Captain Scott, on cross examination, distinctly admits that neither the house-boat nor the scows were provided with rudders: "Q. Captain, you said something about " putting the scows behind the house-boat to act as rud- " ders for the house-boat? A. Yes, sir. Q. Then the " house-boat didn't have a rudder? A. No, sir. Q. Did " these scows have rudders, Captain? A. No, sir"

(Record, p. 69). And on cross examination, Captain Scott directly admits that the only people in charge of the transaction were Cotton Brothers' people: "Q. I " will ask you if there was anybody aboard the Kaena, " that house-boat, or aboard the scows at any time dur- " ing this transaction except employees of Cotton " Brothers? A. No, sir" (Record, pp. 69-70). And Captain Scott's theory and explanation of the loss complained of, developed on cross examination, involves crass negligence. He tells us that the house-boat had been ashore at one end for six months (p. 70); that these were the six months just prior to the tow (p. 70); and that he knew what he was talking about because he " towed her to Pearl Harbor and lived aboard of her all " the time down there" (p. 64). Captain Scott tells us that the fact that one end of the house-boat was ashore was thoroughly well known because, if for not other reason, of the plank from the boat to the dry land (p. 72). Captain Scott further tells us that when the tow in question began he actually pulled the house-boat off the shore (p. 72); and he explains that a good part of her bottom rested on the sand beach (p. 73), and he explains that the effect of all this was that "her seams opened up from " naturally lying too long on the beach" (p. 71); and that she capsized "simply because she had been lying " there so long her seams opened up by towing her" (p. 70). He admits that he would not have undertaken to tow her in a swell (p. 73); and, quite in line with the open seams that he knew of, he admits that "the hull " filled under the floor and she naturally went over as " suddenly as that" (p. 74).

NOR DOES THE TESTIMONY OF WHEELER ASSIST THE LIBELLEES.

Wheeler admits the tandem tow (p. 75). He admits that there was "a small ocean swell" (p. 76). He further admits that there were wind waves also, describing them as "very small wind waves" (p. 76). He admits that the northeast tradewind was blowing (p. 76)—a wind which Captain Nielsen, without any contradiction whatever, describes as a head wind for a vessel coming from Pearl Harbor to Honolulu, a wind which would make a swell in the sea (pp. 47-8). In describing the accident, this witness Wheeler involuntarily shows the presence of the very swell and sea which one would expect at that place. He says: "I was seated in the door of the "engine-room, and I looked back and saw the house-"boat beginning to careen to one side and saw the house "breaking away from the deck on the starboard forward "corner by that first window there (pointing to model), "calling this the starboard end, because the bridle is on "this end of the boat. Q. What do you mean by "breaking away"? "A. Breaking away from the hull, "from the bottom of the vessel, *and was bending and* "*swaying like that* (gesticulating) *with the motion of* "*the waves; whenever she rolled that end* (pointing to "model) *appeared and then would go down again*" (Record, pp. 76-7). And this witness, after the Allan Dunn episode, on page 80, explains his theory of the disaster in terms which fasten negligence upon the libellees. He said: "The Court:—So far as you know what "was the cause of the disaster to the house-boat? A. "Well, as far as I know it was caused by being laid up

" there on the—well, practically on the beach; at differ-
" ent stages of the water it would be afloat and then at
" one end, in-shore end, all on the beach. While lying
" there in still water, in my opinion, she dried out above
" the water line and her seams opened up. Then the
" house was not properly fastened to the hull for an-
" other thing, and when she got out and got into the sea
" *the motion opened up the seams a little bit,* and as she
" got more water into her, that motion became more
" aggravated, and when she commenced to rock and
" rocked the house loose from the hull, she carried
" away".

Strem was the representative of Cotton Brothers (85, 97-8); and as such, made up the tow (p. 85). He never saw any air courses (p. 88). He contradicts Scott and Wheeler as to the boat being aground, admitting, however, the plank running from the boat to the dry land (p. 88). His theory of the accident presupposes the existence of sufficient swell and sea to detach the superstructure of the house-boat from its scow. "Q. And
" your theory of this accident is that the house-boat, by
" reason of the rocking of the house-boat, got detached
" from the hull? A. Yes. * * * Q. And then
" it was the movement, the rocking of the house-boat,
" that was strong enough to detach that house from the
" hull? A. Yes. It loosened the fastenings of the
" house" (Transcript, pp. 88-9). From this resume it is submitted that there can be no doubt as to the substantial correctness of Allan Dunn's testimony.

ARGUMENT.

THE NATURE OF NEGLIGENCE.

The definition most frequently quoted is the celebrated one of Baron Alderson, that "negligence is the omission "to do something which a reasonable man guided by "those considerations which ordinarily regulate the "conduct of human affairs would do, or doing something "which a prudent and reasonable man would not do". This definition stands quoted and approved by able jurists, text writers and lexicographers.

The Nitro-Glycerine Case, 82 U. S. (17 Wall.) 536;
Mok's Underhill Torts, 271;
Saunders, Negligence, introduction;
Rapalje & Lawrence Law Dict., negligence.

Perhaps as good a definition of negligence as could be desired, covering sins not only of commission but also of omission, will be found in the following, taken from an opinion of the Supreme Court:

> "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion."
> *R. R. v. Jones,* 95 U. S. 439, 441-2.

There was no obligation upon Mrs. Almy to anticipate the negligence of these libellees; she is not chargeable with negligence in failing to anticipate their negligence and in not providing against it. Every one has the right

to presume that others will act in a lawful and proper manner, and consequently the law will not hold it imprudent in her to act upon the presumption that the others would do their duty.

2 Thompson, Negligence, 1172;
Shearman & Redf., Negligence, p. 31;
The Robert Lewers, 114 Fed. Rep. 849;
Nitro-Glycerine Case, 82 U. S. (15 Wall.) 524;
Jetter v. R. R., 2 Kees (N. Y.) 154;
Earhart v. Youngblood, 27 Pa. St. 323;
Curtis v. Mills, 5 C. & P. 489;
Deyo v. R. R., 34 N. Y. 9.

Nor is custom or habit any excuse for these libellees, even if such custom or habit were proved in this regard. A person charged with negligence cannot show that the act was customary among those engaged in a similar occupation, or those placed under like circumstances, and owing the same duty. Such an attempt would be in effect to show as an excuse for the defendant's negligence, a custom of others to be equally negligent.

Fletcher v. B. & P. R. R., 168 U. S. 135;
R. & O. Nav. Co. v. B. M. Ins. Co., 136 Id. 408;
G. T. R. R. v. Richardson, 91 Id. 454;
Cleveland v. Steamboat Co., 5 Hun. 523;
Judd v. Fargo, 107 Mass. 264;
Hinkley v. Barnstable, 109 Id. 126;
Littlejohn v. Richardson, 32 N. H. 59;
Ill. R. R. v. Smyser, 38 Ill., 354;
Hamilton v. R. R., 36 Iowa, 31;
Tripp v. Lyman, 37 Me. 250.

And with special reference to tow-boats, the rule as to negligence is thus clearly stated in a very recent case:

> "The authorities clearly establish the doctrine that the liability of a tug for damages caused by negligent towage is 'founded on tort arising out of the duty imposed by law and independent of any contract made, or consideration paid or to be paid for the tug' * * * While the undertaking to tow does not assume the obligation of an insurer, nor liability as a common carrier, it requires the exercise of 'that degree of caution and skill which prudent navigators usually employ in similar services'; and if loss occurs from failure or neglect therein, the towing steamer must respond in damages. The maritime skill and care thus called for is such as is reasonable in that service and under the conditions presented—such as may reasonably be demanded under 'the peculiar circumstances and emergencies of the case'."
>
> *The Temple Emery,* 122 Fed. Rep. 180, 181-2.

ELEMENTS OF NEGLIGENCE.

A careful examination of the transcript will disclose many particulars in which the libellees failed to take those precautions which a reasonably prudent man would have taken under similar circumstances.

1. *The Tow was not carefully constructed.*—The testimony upon this subject alone is sufficient, we submit, to convict these libellees of negligence. All parties agree that the tow was a tandem tow, and that the house-boat was placed between the tug and the scows. Whatever may be the vagaries of the oral testimony, the sworn answer of the libellees describes the scows as, and admits them to be, laden scows; and thus we find a house-boat,

which was never intended to tow anything or to be subjected to unusual strains, placed between the pull of the tug ahead and the pull of the scows astern. Moreover, as Scott tells us, neither the house-boat nor the scows were provided with rudders; and we scarcely needed the testimony of Captain Neilsen (p. 49) to tell us that the house-boat would thus become subjected to an additional and a severe strain. After all, it is but plain common sense that, assuming that other conditions *were* carefully chosen, if the houseboat had been towed at the end instead of the middle, or (if the libellees had not been in such a hurry to get their appliances to Honolulu upon completing their contract) if the house-boat had been towed alone, this occurrence need not have happened.

But there is positive and direct testimony in the record establishing the recklessness of the method employed. Captain Neilsen, an old, certified shipmaster, of many years' experience in steam, familiar with towage and familiar with these Island waters, plainly tells us that the tow was improperly made up, and gives his reasons for it, and fully explains the "double drag" and the strains to which the house-boat would be subjected. The northeast trade wind being a head-wind coming from Pearl Harbor and causing a swell, and the rudderless conditions of the tow, would be obvious circumstances emphasizing the improper conditions surrounding the house-boat; and he further tells us, the safe method of towage, as applied to that house-boat, would have been to have towed it alone.

Captain Neilsen, Record, pp. 47-51, 51.

And the views of Captain Neilsen are fully endorsed by Captain Rouse, another duly certificated master of steam vessels, with about three years' experience in towboating (Record, pp. 51-2).

It is submitted that the opinions of these experts are undisturbed by the extraordinary testimony of Olsen, the partisan advocate produced by the other side; and when it is recalled that this willing witness, after balking at the question whether it was careful and prudent to attempt to tow an open-seamed house-boat from Pearl Harbor to Honolulu, finally sort that, with a fair breeze, some swell and a moderate sea, it would be proper, careful, cautious and prudent seamanship to tow such a vessel (82-4); some justification will be found for the view that his seamanship is as reckless as his swearing. It is not too much to say that if he presented such views as these to the Board of Supervising Inspectors it would cost him his license. The testimony of Wheeler is disposed of by that of Allan Dunn; and that of Strem may be dismissed with the remark that, as the employee of libellee "in charge" at Pearl Harbor, he could hardly be expected to testify otherwise than he did.

The law upon the subject needs no elaboration. The principle to be invoked is simple and direct: It was the duty of the tug, in making up the tow, to see that it was properly constructed. "If she failed in this duty, she " was guilty of a maritime fault."

The Quickstep, 76 U. S. (9 Wall.) 665.

2. *The House-boat should have been towed alone.*— Captain Scott, a witness for libellee, lets us into the

secret of the unusual tow. He tells us that the libellee had just completed a contract at Pearl Harbor, and that, on August 3rd, the tug had been busy bringing up to Honolulu "material left over from the work there". And the idea then was that, on the next day, "*if the water was smooth*", they "would bring up the house-boat and "these two scows behind, *and clean up the whole job*" (Record, 57, 66-7). It was this undue haste, it was this desire to "*clean up the whole job*", and it was this anxiety to save an extra trip for the tug, which had so much to do with the inexcusable carelessness of the transportation; if more thought had been bestowed upon the property committed to their care, and less upon getting the whole job cleaned up, the proverb that "Haste makes waste" would have lacked this additional and costly illustration.

The Temple Emery, 122 Fed Rep. 180.

Captain Neilsen tells us, and his testimony in that behalf is wholly uncontradicted, that the safer method would have been to have towed the house-boat alone. Upon what principle of care and prudence can these libellees be permitted to adopt the less safe method? And is their anxiety to "clean up the whole job" and to avoid an extra trip for the tug, to exculpate them from the consequences of their recklessness?

3. *Common prudence would have dictated the closure of the air courses.*—When the tug and tow started from Pearl Harbor, those in command, who were all employees of libellees, knew, if they knew anything at all, that they would encounter the northeast trades—a head-wind that,

as Captain Scott tells us, "has an effect on a big house like that" (Record, p. 60). And when they left Pearl Harbor, they did actually encounter the northeast trade wind, as Wheeler distinctly informs us (76). And that there was more or less sea on, and that the house-boat had more or less motion, with a freeboard of only 23 inches (Scott, 71-2), clearly appears from the testimony of Dunn, Scott, Wheeler and Strem—Strem even claiming that the violence of her motion "was strong enough " to detach that house from the hull" (89).

But the hull was fitted with air courses—a not unusual and very reasonable improvement, particularly in this climate. These air courses were minutely described by Mr. Allan Dunn on pages 40-41 of the Record, and there is, as already pointed out, no testimony worthy the name, in contradiction. It nowhere appears that these air courses, which were open to the outside (Dunn, 41), were closed up. Scott nowhere pretends that he took this reasonable precaution. His testimony upon the subject is supremely negative; he "never saw any" air courses (65); and Strem, likewise, "never seen them" (88).

Captain Neilsen, however, was interrogated with reference to the propriety of closing up these air courses, as a preliminary to the tow; and he plainly said that it would not be an easy matter to close them up, but also "much safer" (49-50). To this intrinsically sound testimony, the only reply vouchsafed is, not that the air courses could not be so closed as to prevent the intrusion of water into the hull, not that they were even looked for, but that they were never seen. Was there ever a balder confession of ineptitude? The libellee had lived in that

house-boat for six months, and must have been familiar with her. Why were not those air courses seen, particularly where one end of the boat was aground and readily to be inspected from the shore? The libellee knew that the house-boat was to encounter a head wind and a swell, and actually did do so. Why was not the reasonable and prudent precaution taken of closing up these apertures? And was it not the plain duty of the master of the tug to take all antecedent and timely measures of precaution to avoid danger?

The Syracuse, 79 U. S. (12 Wall.) 167.

4. *Failure to select the proper time to tow.*—This tow started from Pearl Harbor about 20 or 30 minutes past two o'clock in the afternoon (Scott, 67); and if the libellee had deliberately determined in advance to wreck the house-boat, it could not have selected a more appropriate time.

Allan Dunn, an intelligent yachtsman, has visited Pearl Harbor, during the last five or six years, at least a hundred times; and, as would be natural with a yachtsman, has made observations as to the conditions of wind, weather and sea at different periods of the day. He tells us that it is "decidedly calmer from twelve (mid-" night) to five in the morning than at any other time " of the day", under ordinary conditions, such as existed upon the occasion involved here (Record, pp. 34-5). And he is corroborated upon this point by Captain Neilsen, who adds that the trade wind "always blows pretty " strong in the afternoon until about sundown" (48). It is significant that the testimony of these witnesses is

wholly uncontradicted; and the significance of this failure to contradict becomes specially pointed when we revert to the testimony of Mr. Dunn relative to the condition of the wind on the date and at the place of the wreck, detailed on pages 30-31 of the Record.

But the libellee and its employees, including the officers of its tug, had been for six months at least in the immediate vicinity of the scene of the wreck; many of them, at least the officers of the tug, were seafaring men; and they could not have been insensible to their marine surroundings. The work that libellee was engaged upon was marine work: "Cotton Brothers had a dredging con-" tract down there" (Scott, 66); and the success of their enterprise depended, among other things, upon the marine conditions by which the work was surrounded—familiarity with those conditions was indispensable. This is practically surrendered in the record; no claim is made that they were unfamiliar with matters of such moment to the success of their labors; the very references to the weather on pages 57 and 73 presupposes more or less familiarity with the matter; and the testimony of Dunn and Neilsen stands unchallenged. Why, then, was the worst instead of the best time selected for this tow? Why was not reasonable care exhibited in the selection of the time for the tow? "Any prudent officer would " have stopped until the weather became calm."

> *The Mollie Mohler*, 88 U. S. (21 Wall.) 230;
> *Tucker v. Gallagher*, 122 Fed. Rep. 847.

5. *Too much was towed at once.*—This was one of the consequences of the wish to "clean up the whole job"

(Scott, 57, 66-7). The "Kaena" is nowhere claimed to be a high-powered boat; in fact, Captain Scott somewhat contemptuously describes her as "a kind of single engine affair" (68). And to illustrate the difficulties under which this "single engine affair" labored, hampered as she was by this house-boat on which "the wind has an effect" (60), and by these two "laden scows" (Answer, *passim*), it may be pointed out that she and her incumbrances started at 2:30 P. M., and the accident happened at 4:45 P. M., during which period of two hours and twenty-five minutes she has traversed only "five and one-half miles to six" (Scott, 67-8). Are not these facts a sufficient commentary upon the lack of care exhibited in this business? Was this a careful way to commit the property of others to the tender mercies of the seas?

6. *The Open Seams.*—Since when has it become careful and prudent to attempt to tow an open-seamed house-boat against a head wind, when the violence of the motion "was strong enough to detach that house from the hull" (Strem, 89)? Captain Scott has been a seafaring man for thirty years (56); he "was raised in a tow-boat" (66); he has seen this houseboat "pretty nearly since she was built" (64); he knew that she had been ashore at one end during the six months just prior to the tow (70); and he knew what he was talking about because he "towed her to Pearl Harbor, and lived "aboard her all the time down there" (64). It was common knowledge that the house-boat was aground, for, as Scott admits, the fact that one end was ashore was well known for the reason, if for no other, that a plank ran from the boat to the dry land, and was used for an

entrance and an exit (72). And when this tow began, Scott was compelled to pull the boat off the shore (72)—a good part of her bottom rested on the sand beach (73). When we reflect that the tide rose and fell at least two feet, according to Agassiz (95), even a landsman, barren of nautical experience, could see that the conditions surrounding that house-boat, lying there and working in that tideway, and shrivelling up in the Pearl Harbor sun, should have suggested the carelessness of pulling her bang off the beach and taking her to sea. Scott tells us that the effect of these surrounding conditions was that "her seams opened up from naturally lying too "long on the beach" (71), and she capsized "simply "because she had been laying there so long her seams "opened up by towing her" (70). He admits that he would not have undertaken to tow her in a swell (73); and quite in line with the opened seams that he must have known of, he further admits that "the hull filled "under the floor and she naturally went over as sud-"denly as that" (74). Is it possible that in the situation thus presented, this court can perceive that prudence and care which the law demands from tow-boats? We apprehend not.

It is true that Agassiz actually has the hardihood to swear that the house-boat was "afloat all the time" (94); but his testimony does not deserve a moment's consideration. He is flatly contradicted by Scott (70-73); he is flatly contradicted by Wheeler (80); he is flatly contradicted by the photograph in evidence, and he is not even supported by the faltering and ambiguous testimony of

Strem, with its "not that I know of", and its admission as to the plank (88).

It may not be improper to add a word upon the lack of consistency, the internal contradictions and the changes of front, apparent in the libellee's case; but since this brief is already too long, we shall limit ourselves to but two illustrations of these infallible earmarks of a decrepit case. *The answer in the case distincty admits our claim that the two scows were "laden scows";* and our claim is supported by the testimony of Allan Dunn (29-30) and of Captain Rouse (55), and partly by that of Captain Scott (59), although later on Scott qualifies his first answer (62). But when we advance to the testimony of Wheeler, we are baldly told, in flat contradiction of the answer, that when the tow left Pearl Harbor, the scows "had nothing at all on them" (76)—a piece of testimony dutifully re-echoed by the ubiquitous Strem, Agassiz' factotum, at pages 86-7. And one further illustration of the unreliability of libellee's case, and of the facility with which libellee can change front according to the varying exigencies of the situation, will be found in the testimony relative to the boat having been aground. The very circumstantial testimony of Scott that she was aground, and aground for the six months just prior to the tow, is fully corroborated by Wheeler; but by the time that the unique and delightful Strem invaded the witness-box, it was beginning to dawn upon libellee that even a landsman could understand the folly of towing to sea a house-boat that had been hung up on a shore working for six months is a tideway, and baking and drying in a tropical sun, and

that it might be wise to attempt to "mend its hold". Strem, however, represented the transition period, and his testimony is somewhat unsatisfactory and inconclusive; he gets no farther than "not that I know of" and "not to my knowledge" (88). These inconclusive phrases will not do for Agassiz, however, and he flatly contradicts his own witnesses and declares that the house-boat was "afloat all the time" (94).

These two illustrations—the contradiction of their own answer in the matter of "laden scows" and their attempt to "mend their hold" in the matter of the house-boat being aground—justify reference to the following thought from the Supreme Court:

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."
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> *Ohio, etc., Ry Co. v. McCarthy,* 96 U. S. 258.

THE AFFIRMATIVE DEFENSE.

It is sought, however, to escape liability herein by setting up the affirmative defense that the tow was at Mrs. Almy's risk. The answer sets up that she requested libellees to remove the house boat from Pearl Harbor to Honolulu for her convenience; "that thereupon and solely " as a favor to and for the convenience of said libellant, " said libellees agreed to so remove said boat, under " the express stipulation and agreement, however, that " the said libellees would in no manner be responsible

" for any loss or damage to said house-boat which might " occur while said boat was being moved to said port of " Honolulu"; and that, pursuant to this request, stipulation and agreement the tow was attempted.

The rule is well settled, upon obvious principles, that the burden of proof that the towage was at the owner's risk, is on the tug:

The American Eagle, 54 Fed. Rep. 1010;

but the requirements of this rule are nowhere complied with in this record. There is not the shadow of a pretense that Mary K. Almy, the admitted owner of the house-boat, ever agreed with anybody that the tow should be at her risk; and Mary K. Almy and H. N. Almy unite in repudiating any such agreement, and unite in repudiating the delegation of authority to any one to enter into any such agreement (104, 109, 113-4).

Failing to establish any agreement with Mary K. Almy, the claim is advanced that the agreement was made with H. N. Almy as her agent; but this claim involved the double burden of establishing, not only that H. N. Almy was Mary K. Almy's agent, but also that it was within the scope of his authority to allow this towage at her risk and without responsibility upon the tug. It is needless to say that the record is barren of proof upon either point. It is true that Agassiz, under objections duly reserved, was tentatively permitted to detail certain declarations of H. N. Almy, the alleged agent; but Agassiz's testimony in this behalf is fully and circumstantially denied by Almy, who is corroborated by libellee's letter of August 5, 1903, which makes the

admission that no request was made by Mary K. Almy, and which makes no claim that the tow was at Mrs. Almy's risk, although mentioning compensation, and written to advise Mrs. Almy of the accident. In this posture of the case, it cannot even be said that the testimony upon this subject is evenly balanced; still less can it be said that the rule requiring cogent evidence has been satisfied.

Eystra v. Capelle, 61 Mo. 578.

But not only has the libellee failed to sustain the burden of proof of this agency, but even if the widest credence were to be accorded to Agassiz' version of Almy's declarations, still neither the alleged agency nor its scope would be established. The story told by Agassiz would nowhere be permitted to support a finding either of the asserted agency or of the extent of the asserted agent's powers; and the matter may be dismissed with the remark that only so recently as April 28, 1904, the Circuit Court of Appeals for the Eighth Circuit observed:

> "The admissions and declarations of an alleged agent are alike incompetent to establish his authority or the extent of his powers."

Walmsley v. Quigley, 129 Fed. Rep. 583, 585.

But even if the agency were established, even if its scope were fixed, even if this alleged contract of towage were proved, yet, given the tug's negligence, the tug would still be responsible for that negligence. That there may be a contract of towage is immaterial, or at most mere inducement to the real grievance complained of; the

libel is not to recover damages for the breach of a contract of towage, but compensation for the commission of a tort; and even if this asserted contract of towage were established, still "the case depends not on any contract, " but on mere tort standing beyond the contract".

N. J. S. N. Co. v. Merchants' Bank, 47 U. S. (6 How.) 344.

Independently, in other words, of any pretended contract of towage, the law impresses upon the tug the duty of using all reasonable care and of avoiding negligence. In brief, that the tow is at the owner's risk is no excuse for the tug's negligence.

The Syracuse, 79 U. S. (12 Wall.) 167;
Alaska Com. Co. v. Williams, 128 Fed. Rep. 362;
The Temple Emery, 122 Id. 180;
The American Eagle, 54 Id. 1010;
The Deer, 7 Fed. Cas. (No. 3737) 351, 352.

THE MEASURE OF DAMAGES.

The loss in this case was a total loss—the house-boat is gone; its identity is destroyed, and the damage done renders the scow valueless for the purposes for which it was designed and held. And this was a new boat; she was built only so recently as July, 1902 (39); and when she was received by the libellees, she represented a value of about $2550 (39). After the accident, Mr. Hughes, who built the scow, inspected the remains; and he testified

that it would require the expenditure of $2000 to restore the boat to the same condition in which she was prior to the accident (37-8). In other words, the damage to the house-boat could not be repaired at Honolulu, according to the uncontradicted testimony, without the expenditure of an amount exceeding half her value after the repairs; hence, for this reason also, the loss was total.

Patapsco Ins. Co. v. Southgate, 30 U. S. (5 Pet.) 604, 619.

The loss being a total loss, the stipulation to pay the sum of $2500 becomes conclusive, and the court has no option but to decree that amount. The very able opinion of Mr. Justice White in a recent cause in the Supreme Court, upon a contract strikingly similar to that at bar, disposes of this and all other questions involving the construction of this lease.

San Pr. & Pub. Assn. v. Moore, 183 U. S. 642.

Within the doctrine of this case, it is submitted, with every possible deference for the opinion of the learned judge of the court below, that under the terms of the lease here involved, the decree should have been for $2500 instead of $1850; and it is hoped that the decree will be modified according to this view. It is therefore

respectfully submitted that, upon the facts and the law, the justice of the case requires, with the modification suggested, an affirmance of the decree.

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